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No. 85-1287

In the Supreme Court of the United States

OCTOBER TERM, 1985

BOARD OF REGENTS OF
THE UNIVERSITY OF OKLAHOMA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in reversing the entry of judgment notwithstanding the verdict on the ground that there was sufficient evidence to support the jury's finding of age discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 774 F.2d 999. The opinion of the district court (Pet. App. 1b-10b) is reported at 554 F. Supp. 735.

JURISDICTION

The judgment of the court of appeals (Pet. App. D) was entered on October 1, 1985. A petition for rehearing was denied on October 31, 1985 (Pet. App. E). The petition for a writ of certiorari was filed on January 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November 1978, the position of chief of the cartography section of the Oklahoma Geological Survey

(OGS) became vacant. Marion Clark, then 59 years old and a long time employee of OGS, was qualified for the position and applied for it. Instead of promoting Clark, petitioner conducted a nationwide search to fill the position and ultimately selected 36-year-old Wayne Furr. The Equal Employment Opportunity Commission brought this action in the United States District Court for the District of Oklahoma alleging, inter alia, that the University's failure to promote Clark was due to her age and therefore violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*[1]

Prior to trial the parties stipulated to a prima facie case (Pet. App. 3a). Therefore, the evidence at trial focused primarily on whether or not petitioner had a valid, nonpretextual reason for failing to promote Clark. The evidence showed that a 19-member search committee was established, chaired by Dr. Charles Mankin, the director of OGS. The committee narrowed the selection to three candidates, including Clark, but ultimately voted to hire Furr. Dr. Mankin was the chief witness for petitioner. He testified that Clark was passed over, not because of her age, but because of her lack of management experience and because of productivity problems in the section (*id.* at 4b). The testimony of other witnesses and other portions of Mankin's own testimony cast considerable doubt upon this explanation. See Pet. App. 6a-8a; point 2, *infra.*

2. After the jury returned its verdict in favor of the Commission, the district court entered judgment for petitioner notwithstanding the verdict (n.o.v.) (Pet. App. 1b-10b). The court found that petitioner's proffered reasons for Clark's nonselection—her "lack of management experience, and her productivity problem" (Pet.

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[1] The Commission also alleged that the University violated the ADEA by retaliating against Clark for filing her charge with the Commission. The jury agreed, and that issue was not raised on appeal.

App. 8b)—"were unrefuted" (*id.* at 9b). In support of that conclusion, the court credited Mankin's testimony that there were productivity problems in the cartographic section that could be resolved only through the injection of "new blood" (*id.* at 4b), and it found that petitioner had proven that Clark herself had a productivity problem (*id.* at 8b). The court also relied upon various selection committee members' testimony that Clark's age was not a factor in their deliberations and that personality conflicts between Mankin and Clark and Clark's relative lack of managerial skills accounted for their decision (*id.* at 5b-6b).

3. The court of appeals reversed (Pet. App. 1a-11a), holding that the evidence was sufficient to support the jury's verdict and that, in ruling otherwise, the district court improperly had "reweighed the evidence and factored in its view of the credibility of the witnesses" (Pet. App. 4a). The court noted that Mankin's testimony regarding the section's productivity problem was both internally inconsistent and inconsistent with other testimony (*id.* at 6a); that there was conflicting evidence concerning Clark's and Furr's relative supervisory qualifications (*id.* at 7a); that, despite alleged productivity concerns, Furr was permitted substantial absences from the section soon after his arrival, which yielded a rise in the number of projects contracted out (*ibid.*); and that there was evidence that Mankin engineered the recruitment and hiring process to thwart Clark's promotion (*id.* at 7a-8a).

ARGUMENT

Petitioner contends (Pet. 7-23) that the court of appeals erred in finding that the evidence was sufficient to support the jury's verdict. This contention is entirely factbound, and it is without merit.

1. At the outset, we note that petitioner's assertion (Pet. 12-18) that the court of appeals' opinion conflicts with decisions in other circuits is wholly without foundation. The legal standard for review of judgment notwithstanding the verdict utilized by the court below (see Pet. App. 4a) accords with the standard used in other decisions—namely, judgment n.o.v. is appropriate only when the evidence as a whole points but one way and is susceptible of no reasonable inferences that would support the jury's verdict. See, *e.g.*, *Coburn* v. *Pan American World Airways, Inc.*, 711 F.2d 339, 342 (D.C. Cir.), cert. denied, 464 U.S. 994 (1983); *Krieg* v. *Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983); *Halsell* v. *Kimberly-Clark Corp.*, 683 F.2d 285, 295 (8th Cir. 1982); *Douglas* v. *Anderson*, 656 F.2d 528, 535 (9th Cir. 1981); *Houser* v. *Sears, Roebuck & Co.*, 627 F.2d 756, 757 (5th Cir. 1980). Whether a judgment n.o.v. has been correctly entered turns on the facts of each case, and the fact that reversal by the court of appeals was appropriate here and affirmance was appropriate in the cases cited by petitioner reflects no more than the application of settled legal principles to different fact patterns.

Petitioner mischaracterizes the court of appeals' decision in stating (Pet. 7) that it holds that "where a complainant has established a *prima facie* case in an age discrimination action, a directed verdict or judgment notwithstanding the verdict is not proper." To the contrary, the court did not focus on the existence of a prima facie case; it addressed the question whether the Commission had produced sufficient evidence to allow a reasonable jury to find that petitioner's explanation of its actions were pretextual and, therefore, that Clark's age was a determining factor[2] in her nonselection (see Pet. App. 5a-8a).[3]

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[2] The court of appeals inquired "whether the promotion would have been granted but for the plaintiff's age" (Pet. App. 5a).

[3] In the course of its argument, petitioner states that the "hiring [of] a younger person instead of an older one [cannot] raise an inference of

The court's analysis was wholly consistent with the principle put forth by petitioner that "once the employer has articulated a legitimate nondiscriminatory reason for the decision, the presumption created by the *prima facie* case is destroyed, *and without more*, there can be no inference of age discrimination" (Pet. 17-18) (emphasis supplied). The court of appeals was examining precisely the "something more" that the Commission supplied here, viz., testimonial and documentary evidence that petitioner's chief witness, called to explain his actions, was unworthy of belief and therefore that the articulated reason was not in fact the true reason for the employment decision. See *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981).[4]

By the same token, the court did not improperly place upon petitioner the burden of proving nondiscrimination (cf. Pet. 19-20). The court stated (Pet. App. 5a):

> With the stipulation [of a prima facie case], the burden of going forward shifted to the employer to rebut the presumption of discrimination by producing evidence that the employer's choice was motivated by a legitimate, non-discriminatory reason. If, by admissible evidence, the employer's explanation raises a genuine issue of fact * * * the burden of proof returns to the plaintiff.

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discrimination" (Pet. 13). As this Court has made clear, however, the unexplained selection of someone outside a protected class can raise an inference of discrimination. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). And where, as here, a plaintiff shows that the proffered explanation was pretextual, the fact finder may reasonably infer a discriminatory motive.

[4] It is clear that a proffered justification can be shown to be pretextual by means of discrediting the testimony that advances that justification. See, *e.g.*, *Carter* v. *Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1233-1235 (D.C. Cir. 1984); *Metrocare* v. *Washington Metropolitan Area Transit Authority*, 679 F.2d 922, 926-927 (D.C. Cir. 1982); *Douglas* v. *Anderson*, 656 F.2d at 535 n.7.

Thus, the court of appeals' approach was fully in accord with that set forth in *Burdine,* 450 U.S. at 252-256—the defendant has the burden of production of a legitimate reason for the employment decision in order to rebut the prima facie case and the plaintiff then has the burden of proving that the proffered reason is pretextual. The plaintiff may make this latter showing "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence" (*id.* at 256).[5]

2. The court of appeals correctly found that the jury verdict was supported by the evidence. The Commission sought to show that petitioner's proffered explanation for Clark's rejection was "unworthy of credence" (*Burdine,* 450 U.S. at 256). To the extent the jury disbelieved petitioner's explanation, its action remained "otherwise unexplained" and the jury could reasonably have inferred that Clark's nonselection was based "on the consideration of impermissible factors," viz., her age. *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 577 (1978).

There was ample evidence here to support the Commission's theory that Mankin had discounted Clark for promotion because of her age, that he engineered the recruit-

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[5] There is no merit to petitioner's assertion (Pet. 19) that the court of appeals' opinion "allows the jury to substitute its business judgment for [that of] the employer's." Indeed, the jury below was specifically instructed "that the [d]efendant is entitled to make its own subjective business judgments concerning how its business is to be conducted, as long as its actions are motivated by factors other than age discrimination," and that "an employer is not legally obligated to give preferential treatment to persons in the protected age class when making hiring decisions" (VI Tr. 235). The court of appeals simply allowed the jury to find that petitioner's claim (Pet. 21) that the "members of the nineteen-member search committee determined that Mr. Furr's qualifications for the job were superior to Ms. Clark's" was not supported by the record as a whole.

ment and selection process to achieve this predetermined end, and that his purported concern about the section's productivity and Clark's alleged inability to remedy the problem were pretextual. There was evidence that he conducted an unusual national search in contrast to the University's normal policy of encouraging promotions from within (IV Tr. 104; PX 3) and that he criticized her qualifications before the selection committee (II Tr. 60-63; VI Tr. 140-141, 180-181).[6] Indeed, in order to hire Furr, a man 23 years Clark's junior, Mankin had to persuade the employer to increase the salary for the position on two separate occasions by a total of about 40 percent.[7] Mankin's claim that this effort was due to the need to improve the section's productivity was severely undermined on cross-examination by his internally inconsistent testimony regarding productivity, which in part was refuted by documentary evidence.[8] Mankin's alleged con-

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[6] In the words of one member, Mankin's effort "was a pretty obvious attempt to influence the [committee] vote," and Mankin's comments were "fairly devastating" to Clark's application (VI Tr. 169, 181). Mankin denied that he was critical of Clark's qualifications and that he made other statements attributed to him by other witnesses (IV Tr. 30-32).

[7] At the beginning of the national search, Mankin persuaded the University's personnel office to increase the position's salary range from $13,000-$14,000 to $17,000 (PXs 1, 69; IV Tr. 79; VI Tr. 59; PX 69). Mankin testified that after the vote he discovered that Furr required at least $19,000 annually (IV Tr. 25). Pursuant to Mankin's second request to the University's personnel office (III Tr. 46; PX 25), the salary range was increased to $14,560-$19,885 (PX 70).

[8] Mankin variously testified that he had been concerned about productivity in the section since 1971 (IV Tr. 3), or since 1974 (III Tr. 97); that as far as he knew productivity could have been fine (III Tr. 68); that he had no way of knowing whether there was any productivity problem (II Tr. 90; III Tr. 68, 94); that there was no documentation of his concern (III Tr. 98); that there was written documentation of his concern dating back to 1974 (III Tr. 97) that is not reflected in the record; and that he never commended the section for the quantity of

cern for the section's productivity was further belied by the release of Furr to attend university classes after his hire and by the unprecedented amount of work contracted out after that time (see I Tr. 181; IV Tr. 195; V Tr. 55). For these reasons, the jury justifiably could have completely discredited Mankin, who was petitioner's primary vehicle for the articulation of its "legitimate" reasons for not promoting Clark, and found that in the absence of another credible explanation, age did play a role in the selection process. See *Burdine,* 450 U.S. at 255 n.10; *Metrocare* v. *Washington Metropolitan Area Transit Authority,* 679 F.2d at 926-927.

With respect to Clark's alleged deficiencies in supervisory/managerial skills, the jury reasonably could have concluded that this explanation was also pretextual. Mankin testified that he was unaware that Clark often performed as acting chief of the section (Supp. Tr. 69), but that testimony was refuted by another witness (VI Tr. 140-142). Moreover, one of Furr's letters of recommendation noted his "lack of exposure to supervision" (DX 61). Prior to 1979, Clark was given excellent performance evaluations by Mankin and the largest aggregate salary increase in the section (I Tr. 91; IV Tr. 42-43). Based upon the objective evidence, the jury reasonably could have concluded that Furr was no better qualified than Clark in this regard.[9] In sum, it was only by reweighing the evidence and the credibility of witnesses that the district

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its production (IV Tr. 21), though the minutes of a January 1977 staff meeting reflected that he had (PX 66, at 3; IV Tr. 42). Mankin also testified that any productivity problem in the section was the fault of Roy Davis (III Tr. 100), whose November 1978 resignation as section chief created the vacancy at issue, not Clark.

[9] Petitioner errs in criticizing (Pet. 7-11) the court of appeals' factual observations as contrary to the record or irrelevant to the issue of discrimination. Petitioner does have a policy favoring promotion

court could have entered judgment n.o.v. Accordingly, the court of appeals correctly reversed this usurpation of the jury's role.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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from within (see IV Tr. 104; PX 49, at 3). The additional procedural irregularities noted by the court and further explained by petitioner (Pet. 9-10) simply supplement the evidence that Mankin manipulated the selection process, as the Commission alleged. In criticizing the court for understating Furr's supervisory qualifications (Pet. 11), petitioner merely reviews the evidence in the light most favorable to its position, which is precisely the opposite of the review required on its motion for judgment n.o.v. Petitioner misses the import of the court's observations concerning Furr's classroom absences after his hire (Pet. 10-11), which suggest that Mankin's concern for productivity was pretextual.